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NO. 76-451

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

ALABAMA POWER COMPANY,
Petitioner,
v.
RAYMOND E. DAVIS,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF FOR PPG INDUSTRIES, INC. AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 42(a) of the Rules of Court, all parties to the case have consented in writing to the filing of this brief and the participation of PPG Industries, Inc. (previously known as Pittsburgh Plate Glass Company) as amicus in this case.

PPG Industries, Inc. has more than fifty pension agreements at its various facilities throughout the United States. These pension agreements condition pension benefits upon bona fide work requirements. For this reason, PPG Industries, Inc. has a direct interest in the issues presented for the Court's consideration in this case.

SUMMARY OF ARGUMENT

Pension rights are not attributes of seniority. Pensions are deferred compensation for services rendered with payments commencing at retirement. Pensions are distinguishable from severance payments which are based usually upon seniority and are designed to alleviate the immediate hardships caused by the loss of the employee's job. On the other hand, a pension payable at retirement age does not protect an employee against the harsh economic consequences of an involuntary lay-off since the pension benefit is not payable at the time of lay-off.

With reference to contractually negotiated fringe benefits, veterans should not be entitled to any benefits under the Military Selective Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. Sec. 459(b) & (c) (hereinafter referred to as the "Act"), unless they have complied with the bona fide work requirements which are contractual conditions precedent for employee entitlement to such benefits. In its most elemental structure, if a pension agreement specifies that "X" cents will be put into an employee's retirement fund for each hour that he works, the resulting pension is clearly a deferred wage and not a perquisite of seniority. Such a conclusion should also follow whenever an employee's pension benefit requires compliance with a significant work requirement.

ARGUMENT

A. Pensions Are Not Perquisites of Seniority

The present veterans reemployment provisions had their genesis in the Selective Service Act of 1940, 54 Stat. 885, 890. Over the years, the sections involved in the present litigation have been largely unchanged.[1]

In 1940, the development of private pension plans were in their infancy. Benefit payments to private employees in 1940 were one hundred forty million dollars.[2] During the years from 1930 to 1942, the Bureau of Internal Revenue approved only 1,360 plans covering 980,100 employees.[3] Thus, it is a fair assumption that Congress did not contemplate a pension as being an attribute of seniority as the term was then understood by union and management.

Pensions are not seniority rights, but are benefits paid upon retirement with funds accumulated for the employee in lieu of an increase in current wages. The concept that pensions are wages is well established and consistently recognized under the National Labor Relations Act since *Inland Steel Co. v. NLRB,* 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949), cert. granted on another point and aff'd 339 U.S. 382 (1950).

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1. *See Foster v. Dravo Corp.,* 420 U.S. 92, 96 and n 6. (1975)

2. Social Security Bulletin, Statistical Supplement, 1965; R. Murray, Economic Aspects of Pensions a Summary Report, National Bureau of Economic Research Inc., p. 15.

3. C. Dearing, Industrial Pensions, Brookings Institution p. 37, citing U.S. Bureau of Internal Revenue, "Pension Trust Statistical Table," Table 2 (August, 1946) mimeo.

In 1956, the Senate Subcommittee on Welfare & Pension Funds declared:

> "These employer-employee plans, whether or not collectively bargained, or whether contributed solely by management, or on a joint management-employee basis, actually, and under existing law, proceed on the basis that the contributions to them by management are in the nature of employees compensation for employment or stated in another way . . . 'that the cost of any employee's service is greater than the amount currently paid him as wages.'" S. Rep. No. 1734, 84th Cong. 2nd Sess. 3 (1956)

To the same effect, in reporting a bill which became the Welfare and Pension Plans Disclosure Act, the Senate Committee on Labor and Public Welfare stated:

> "Regardless of the form they take, the employers' share of the cost of these plans or the benefits the employers provide are a form of compensation." S. Rep. No. 1440, 85th Con., 2nd Sess. 4 (1958)

Accardi v. Pennsylvania R.R., 383 U.S. 225 (1966) is distinguishable. The railroad claimed that firemen were not necessary on new diesel tugs and sought to abolish the job of firemen. After a strike, the union and the railroad agreed to abolish the position of firemen on all diesel tugs. A displaced fireman (a veteran) claimed severance pay.

The employer in *Accardi* contended that the severance payments, in essence, were deferred compensation for work previously performed. The Court did not accept this argument because there was no correlation between the amount of work required and the amount of severance pay. An employee who worked a mere seven days a year, but who continued on the seniority rolls for the remainder of the year, would be entitled to the same severance pay as an employee who worked every day of the year. This unrealistic relationship of the benefit to hours worked prompted the Court to conclude that the result was "bizarre." The benefit was in reality based upon seniority and not upon hours worked.[4]

Thus, *Accardi* is distinguishable from the instant case. In *Accardi,* the United States Supreme Court concluded that the requirement that an employee work only seven days in a year in order to be credited with a year of compensated service in calculating his severance pay was a mere sham because the required work time was negligible. In the instant case, there is a significant and substantial work requirement.

Furthermore, there is a significant practical distinction between severance payments or supplemental unemployment benefits and pension benefits. A severance plan or supplemental unemployment plan enables an employee who loses his job to provide for the immediate needs of his family and protect himself against some of the economic losses resulting from his unemployment. The severance benefit will be available for medical expenses, mortgage payments and other living expenses. On the other hand, a deferred pension benefit which an employee is eligible to receive when he attains age 65 and which he forfeits if he dies before reaching that age provides no protection for the loss of his job. Functionally pensions are primarily designed to meet the need for an assured income after a person's working life.

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4. Thomas R. Haggard, Veterans Reemployment Rights and the Escalator Principle, 51 B.U.L. Rev. 539, 571 (1971).

Pensions provide economic benefits during that inevitable period in life when an individual is no longer physically or mentally capable of earning a living. On the other hand, severance benefits and employment benefits compensate an employee for the loss of his right to exercise his seniority to maintain active employment with his employer. Hopefully, an employee will never have to receive unemployment benefits or severance pay, but the need for an income during old age is incapable of being avoided. Thus, pensions are not a perquisite of seniority, per se, and an analysis of the existing labor agreement is necessary to determine the proper classification of pension under the veterars' reemployment statutes.

B. Benefits Conditioned Upon Bona Fide Work Requirements Are Not Seniority Rights

Since Congress did not define the term "seniority," this term "derives its content from private practices and agreements." *Accardi v. Pennsylvania R.R., supra* at 229. However, *Accardi* concluded that private employers had to comply with Congressional intent and that this "intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment . . ." *Accardi v. Pennsylvania R.R., supra* at 229

Thereafter, the Court has consistently applied the veterans' reemployment statute "to assure that benefits and advancements that would necessarily have accrued by virtue of continued employment would not be denied the veteran merely because of his absence in military service." *Foster v. Dravo Corp.,* 420 U.S. 92 at 97 (1975); see also *McKinney v. Missouri-Kansas-Texas R. Co.,* 357 U.S. 265, 272 (1958) Seniority is a benefit which flows inexorably as a consequence of the legal relationship of employer-employee. However, when a contractual benefit is conditioned upon actual hours worked or actual days of work the contractual condition must be satisfied before the veteran is entitled to the benefit.[5]

In *Foster v. Dravo, supra,* this Court aptly reasoned as follows:

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5. Thomas R. Haggard, Veterans Reemployment Rights and the Escalator Principle, 51 B.U.L. Rev. 539, 527 (1971); Note—Veterans Rights Under The Universal Military Training and Service Act—Seniority Provisions, 1 Ga. Law Rev. 293, 307-308 (1967).

> "... Generally, the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation... But where the work requirement constitutes a bona fide effort to compensate for work actually performed, the fact that is correlates only loosely with the benefit is not enough to invoke the statutory guarantee." 420 U.S. 99-100

Thus, the Court in *Foster* held that a returning veteran was not entitled a vacation benefit unless he had complied with the work requirement of the labor agreement.

The Third Circuit in *Litwicki v. Pittsburgh Plate Glass Industries, Inc.*, 505 F.2d 189 (3rd Cir. 1974), applying the work requirement test to a pension agreement held:

> "Our analysis of this pension agreement leads us to the firm conclusion that the benefits therein provided are not perquisites of seniority under the Act. These pension benefits essentially are deferred compensation based upon a substantial work requirement. Thus we hold that, neither for purposes of vesting nor for purposes of calculating amount of pension benefits, does the Act require that credit be given for military service." 505 F.2d at 193.

The Tenth Circuit in *Jackson v. Beech Aircraft Corp.*, 517 F.2d 1322 (10th Cir. 1975) likewise held that pension benefits are not seniority benefits, but are deferred compensation based on a substantial work requirement. The Courts in *Litwicki* and *Jackson* correctly interpreted the Act. Veterans are not entitled to wages during the period of military service.

The Court in *Aeronautical Industrial District Lodge v. Campbell*, 337 U.S. 521, at 526 (1949) stated "seniority rights derive their scope and significance from union contracts." The terms of the Alabama Power Company's pension agreement compel the conclusion that pension rights for both vesting and benefit purposes are conditioned upon a substantial work requirement and are not a seniority right.

CONCLUSION

For the reasons stated above, the amicus curiae urges the Court to reverse the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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